

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GRANT HEWITT BALDERREE, ) Civil No. 11-2782-LAB(WVG)  
Petitioner, )  
v. ) REPORT AND RECOMMENDATION  
F. CHAVEZ, Warden, ) DENYING PETITION FOR WRIT  
Respondent. ) OF HABEAS CORPUS  
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)

I

INTRODUCTION

Grant Hewitt Balderree ("Petitioner"), a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus ("Petition"), pursuant to 28 U.S.C. § 2254. Respondent F. Chavez ("Respondent") filed an Answer to the Petition ("Answer"). Petitioner filed a Traverse.

The Court, having reviewed the Petition, Answer, and Traverse, hereby finds that Petitioner is not entitled to the relief requested and therefore RECOMMENDS that Petitioner's Petition be DENIED.

## 1 II

2 FACTUAL BACKGROUND

3 This statement of facts is substantially taken from the  
 4 unpublished opinion of the California Court of Appeal, filed as  
 5 Respondent's Lodgment No. 7.

6 On June 12, 2007, police sought to arrest Petitioner based on  
 7 an arrest warrant for robbery from Washington State. Police believed  
 8 Petitioner was inside a residence on Princeton Avenue in La Mesa,  
 9 California and began the process of securing a search warrant for  
 10 that residence. While the police were waiting for the warrant,  
 11 Officers Sweeney, Runge, and Harman conducted undercover surveil-  
 12 lance of the residence. Sweeney was sitting in a plain, unmarked  
 13 silver sports utility vehicle ("Silver SUV") while Runge and Harman  
 14 were in a plain, unmarked brown sports utility vehicle ("Brown  
 15 SUV").

16 The officers observed a woman leave the residence and drive  
 17 away in a Chrysler Sebring. Approximately five to ten minutes later,  
 18 the vehicle returned. As it approached the Silver SUV, the woman  
 19 driving it slowed down and stared into the Silver SUV. The woman  
 20 parked and re-entered the residence. She may also have made a  
 21 cellular telephone call. Sweeney assumed that he had been seen and  
 22 identified as a police officer. Therefore, he departed.

23 Runge and Harman continued their surveillance until a man, who  
 24 was not Petitioner, left the residence to walk a dog. The man passed  
 25 the Brown SUV and said good morning to Runge and Harman through the  
 26 open vehicle window. Runge and Harman were concerned that the man  
 27 was actually checking to see if they were police officers watching  
 28 the residence. Runge and Harman notified Sweeney that their position

1 had also been compromised. Sweeney radioed for marked police  
 2 vehicles to set up a perimeter to contain the area until the search  
 3 warrant could be obtained.

4         About 20 minutes later, Harman and Runge saw Petitioner leave  
 5 the residence and drive down Princeton Avenue in the Sebring. Runge  
 6 and Harman, in the brown SUV, began following Petitioner. Sweeney  
 7 also returned to Princeton Avenue, traveling in the opposite  
 8 direction. When Petitioner was about 40 or 50 feet from Sweeney, he  
 9 turned his vehicle around and started heading back towards Harman  
 10 and Runge. Runge, driving the Brown SUV, positioned his vehicle at  
 11 an angle in an attempt to block Petitioner from driving past him.  
 12 Sweeney, driving the Silver SUV that was now behind Petitioner,  
 13 activated the police lights and sounded the siren.

14         Then, Petitioner approached the gap between the front of the  
 15 Brown SUV and the side of an unoccupied parked truck and accelerated  
 16 through it. In doing so, Petitioner struck both vehicles and pushed  
 17 the Brown SUV out of the way.<sup>1/</sup>

18         Petitioner then drove away from the scene, eluding search  
 19 vehicles. Petitioner was apprehended later that evening.

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24         <sup>1/</sup> The prosecution argued, and the jury found, that Petitioner struck the Brown  
 25 SUV in a successful attempt to push it out of the way. The defense argued that  
 26 Petitioner struck the Brown SUV inadvertently while trying to escape past it.  
 27 Petitioner argues that his counsel presented this defense against his wishes and  
 without investigating Petitioner's theory. Petitioner's theory was that the Brown  
 SUV rammed him as he escaped past it. The record reveals that Petitioner raised  
 this theory and counsel's failure to present it as early as his trial statement  
 in mitigation. (Resp. Lodg. No. 1 at 117).

28         The Court of Appeal acknowledged that counsel had not presented the ramming  
 defense but nevertheless found that "Balderree's version of events was presented  
 to the jury..." (Resp. Lodg. No. 13 at 2). This is inconsistent.

## 1 III

2 PROCEDURAL HISTORY

3 On June 12, 2008, a jury found Petitioner guilty of (1)  
 4 assault with a deadly weapon against a police officer, (2) resisting  
 5 a police officer, and (3) committing vandalism resulting in damage  
 6 exceeding \$400.00. (Resp. Lodg. No. 1 at 156, 400-01). On August 12,  
 7 2008, the court denied Petitioner's Motion For A New Trial and a  
 8 Motion to Strike. Petitioner was sentenced to 35 years to life in  
 9 prison.<sup>2/</sup> (Resp. Lodg. No. 2 at 418-19, 421).

10 On September 5, 2008, Petitioner appealed his convictions to  
 11 the California Court of Appeal, arguing that the evidence was  
 12 insufficient to prove that he had committed felony assault on a  
 13 police officer and that admission of prior high-speed chases was  
 14 reversible error. (Resp. Lodg. No. 4). On August 11, 2009, the Court  
 15 of Appeal affirmed his convictions. (Resp. Lodg. No. 7). On  
 16 September 14, 2009, Petitioner petitioned the California Supreme  
 17 Court for Review. (Resp. Lodg. No. 8). On October 22, 2009, the  
 18 California Supreme Court denied his Petition for Review. (Resp.  
 19 Lodg. No. 9).

20 On December 29, 2010, Petitioner filed a Petition for Writ of  
 21 Habeas Corpus in the San Diego Superior Court. (Resp. Lodg. No. 10).  
 22 Petitioner raised two claims: (1) ineffective assistance of counsel  
 23 and (2) a Brady violation.<sup>3/</sup> (Resp. Lodg. No. 10 at 11, 20). On  
 24

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25 <sup>2/</sup> On Count 1, Petitioner was sentenced to 25 years to life under the three  
 26 strikes law plus two consecutive terms of five years each for serious priors  
 27 alleged as enhancements. On Count 2, Petitioner was sentenced to the same term but  
 imposition was stayed, pursuant to California Penal Code 654.

28 <sup>3/</sup> On collateral appeal to the California Supreme Court, Petitioner added the  
 two claims from his direct appeal. These claims were not included in Petitioner's  
 San Diego Superior Court or California Court of Appeal collateral appeals.

1 January 14, 2011, the petition was denied by the San Diego Superior  
 2 Court. (Resp. Lodg. No. 11). On March 18, 2011, Petitioner filed a  
 3 Petition for Writ of Habeas Corpus in the California Court of  
 4 Appeal. (Resp. Lodg. No. 12). On April 26, 2011, the Petition was  
 5 denied by the California Court of Appeal. (Resp. Lodg. No. 13). On  
 6 May 22, 2011, Petitioner filed a Petition for Writ of Habeas Corpus  
 7 in the California Supreme Court. (Resp. Lodg. No. 14). On November  
 8 11, 2011, the Petition was denied by the California Supreme Court.  
 9 (Resp. Lodg. No. 15).

10 On November 28, 2011, Petitioner filed the Petition for Writ  
 11 of Habeas Corpus now before the Court. See Petition.

12 IV

13 STANDARD OF REVIEW

14 In order for federal subject matter jurisdiction over a  
 15 petition for writ of habeas corpus to lie, the petition must allege  
 16 that the petitioner is in custody in violation of the Constitution,  
 17 laws, or treaties of the United States. See 28 U.S.C.A. § 2254(a).  
 18 In habeas corpus cases, federal courts are bound by the state's  
 19 interpretation of its own law. Estelle v. McGuire, 502 U.S. 62, 68  
 20 (1991) (federal courts may not reexamine state court determinations  
 21 on questions of state law); Jackson v. Ylst, 921 F.2d 882, 885 (9th  
 22 Cir. 1990) (federal courts "have no authority to review a state's  
 23 application of its own laws.") Therefore, errors of state law only  
 24 concern a federal habeas court when those errors rise to the level  
 25 of a constitutional violation. See Oxborrow v. Eikenberry, 877 F.2d  
 26 1395, 1400 (9th Cir. 1989).

27 Under the Antiterrorism and Effective Death Penalty Act of  
 28 1996 ("AEDPA"), the Court may only grant a habeas petition when the  
 underlying state court decision:

1 (1) resulted in a decision that was contrary to , or  
2 involved an unreasonable application of, clearly estab-  
3 lished federal law, as determined by the Supreme Court of  
4 the United States; or (2) resulted in a decision that was  
based on an unreasonable determination of the facts in  
light of the evidence presented in the state court  
proceeding.

<sup>5</sup> 28 U.S.C. § 2254(d)(1) and (2).

A state court's decision may be found to be "contrary to" clearly established Supreme Court precedent: (1) "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from the [the court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-406 (2000); Lockyer v. Andrade, 538 U.S. 63, 72-75 (2003). A state court decision involves an "unreasonable application" of clearly established federal law, "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or, "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407; Lockyer, 538 U.S. at 76.

When there is no reasoned decision from the state's highest court, the Court "looks through" to the underlying appellate court decision. *Ylst v. Nunnmeaker*, 501 U.S. 797, 801-06 (1991). If the dispositive state court order does not "furnish a basis for its reasoning," federal habeas courts must conduct an independent review of the record to determine whether the state court's decision is

1 contrary to, or an unreasonable application of, clearly established  
 2 Supreme Court law. See Delgado v. Lewis, 223 F.3d 976, 982 (9th  
 3 Cir.2000) (overruled on other grounds by Lockyer, 538 U.S. at  
 4 75-76); Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008).  
 5 However, where a state court's decision is "unaccompanied by an  
 6 explanation, the habeas petitioner's burden still must be met by  
 7 showing there was no reasonable basis for the state court to deny  
 8 relief." Harrington v. Richter,--- U.S. at ---, 131 S.Ct. 770, 784  
 9 (2011).

10 V

11 DISCUSSION

12 Petitioner's Petition raises four grounds for relief: (1)  
 13 Ineffective Assistance of Counsel ("IAC"), (2) Brady violation when  
 14 prosecutors withheld video evidence, (3) Improper admission of prior  
 15 high speed vehicular flight from police, and (4) Insufficient  
 16 evidence to prove felony assault upon police.

17 A. GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

18 At trial, Petitioner was represented by Daniel Cohen, a  
 19 private attorney who was appointed by the trial court after the  
 20 Public Defender's Office declared a conflict of interest and  
 21 withdrew from representation of Petitioner. At trial, Cohen  
 22 presented a defense based on the theory that Petitioner had  
 23 accidentally struck the Brown SUV while trying to escape. Petitioner  
 24 contends that Cohen failed to investigate Petitioner's claim that  
 25 the Brown SUV had actually rammed him while he was driving past it.

26 Petitioner raises several arguments in support of his claim  
 27 that Cohen was ineffective as counsel: (1) Cohen refused to discuss  
 28 trial strategy or tactics with Petitioner and further refused to

1 accept telephone calls from, or meet with, Petitioner, (2) Cohen  
 2 failed to investigate witnesses identified by Petitioner, (3) Cohen  
 3 failed to conduct any reasonable pretrial investigation, (4) Cohen  
 4 improperly allowed the prosecution to withhold exculpatory evidence,  
 5 and (5) Cohen introduced evidence that "basically admitted guilt"  
 6 and was "very damaging" to Petitioner's case. No deposition,  
 7 declaration, or other statement by Cohen is present in the record.

8 Under Strickland v. Washington, two elements are essential to  
 9 a successful IAC claim: deficient performance of counsel and  
 10 resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687  
 11 (1984). To show deficient performance, the "person challenging a  
 12 conviction must show that 'counsel's representation fell below an  
 13 objective standard of reasonableness.'" Harrington, 131 S.Ct. 770 at  
 14 787 (quoting Strickland, 466 U.S. at 688). To show resulting  
 15 prejudice, the person must show "a reasonable probability that, but  
 16 for counsel's unprofessional errors, the result of the proceeding  
 17 would have been different. A reasonable probability is a probability  
 18 sufficient to undermine confidence in the outcome." Strickland, 466  
 19 U.S. at 694. The reviewing standards set forth by Strickland and  
 20 AEDPA are both "highly deferential." Id. at 689. Consequently, when  
 21 both are in operation, review is doubly so. Knowles v. Mirzayance,  
 22 556 U.S. 111, 123 (2009).

23 1. Refusal to Discuss Trial Tactics or Meet With Petitioner

24 The California Court of Appeal summarized this portion of  
 25 Petitioner's IAC claim but did not directly address it. (Resp. Lodg.  
 26 No. 13 at 1). The Court therefore looks through to the Superior  
 27 Court's opinion. See Ylst, 501 U.S. at 801-06. Here, the Superior  
 28 Court's opinion cites a California case for the proposition that

1 "the number of times [a defendant] sees his attorney ... does not  
 2 establish incompetence." (Resp. Lodg. No. 11 at 3). Respondent  
 3 identifies no equivalent federal authority to support that proposi-  
 4 tion.<sup>4/</sup>

5 In the case cited by the Superior Court, the fact that a  
 6 defendant only met with appointed counsel once did not establish  
 7 incompetence. See People v. Silva, 45 Cal. 3d 604, 622 (1988). Here,  
 8 the Superior Court concluded that Silva was applicable because  
 9 "Petitioner has not shown ... what prejudice he suffered by not  
 10 having additional meetings with defense counsel." (Resp. Lodg. No.  
 11 11 at 3, emphasis added). Therefore, it appears that the Superior  
 12 Court believed that Petitioner and Cohen met at least once. However,  
 13 Petitioner alleges that Cohen never met with him to discuss the  
 14 case.<sup>5/</sup>

15 Under federal case law, counsel is not necessarily ineffect-  
 16 tive merely because counsel failed to meet with a client in jail.  
 17 Anderson v. Calderon, 232 F.3d 1053, 1085-86 (9th Cir. 2000)  
 18 (counsel who met defendant for the first time at trial but communi-  
 19 cated daily thereafter and had previously discussed the case with  
 20 investigators and experts was not ineffective) [overruled on other  
 21 grounds, Osband v. Woodford, 290 F.3d 1036, 1043 (9th Cir. 2002)].  
 22 Here, Petitioner contends that Cohen did not meet with him before  
 23 trial (except to encourage Petitioner to plea bargain). However,  
 24 Petitioner claims to have "made counsel aware on numerous occasions

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25  
 26 <sup>4/</sup> With regard to Petitioner's IAC claims, Respondent's argument is simply a  
 27 summary of the state courts' opinions. See Answer at 5-6.

28 <sup>5/</sup> Petitioner claims that Cohen's contact with him was limited to five minutes  
 before pre-trial hearings. Petitioner contends that these limited meetings were  
 used only to pressure Petitioner to accept plea agreements. Nothing in the record  
 contradicts Petitioner's allegations.

1 of the existence of the witness Nancy Lattman, and the importance of  
 2 her testimony." Petition at 14. Therefore, it is reasonable to  
 3 assume that Cohen and Petitioner communicated about the case at some  
 4 point before the conclusion of the trial.

5 Given the doubly-deferential standard of review established  
 6 by Strickland and AEDPA, the facts here do not show an unreasonable  
 7 application of Supreme Court precedent. Although meetings and trial  
 8 discussions with a client are desirable, it would not have been  
 9 unreasonable for the Superior Court to find that Cohen's performance  
 10 was within the "wide range" of reasonable professional assistance  
 11 contemplated by the Supreme Court, despite his alleged failure to  
 12 meet and discuss.<sup>6/</sup> See Harrington, 131 S.Ct. at 778. Furthermore,  
 13 the Superior Court's implicit finding (that Cohen had met with  
 14 Petitioner at least once) was not an unreasonable determination of  
 15 the facts in light of the evidence because Petitioner admitted that  
 16 Cohen had met with him for five minutes before pre-trial hearings.

17 Consequently, Petitioner has not shown that the Superior  
 18 Court erred when it determined that Cohen's alleged failure to meet  
 19 or discuss trial tactics with Petitioner did not constitute IAC.

20 2. Failure to Interview Witnesses Identified by Petitioner

21 The California Court of Appeal did not summarize nor address  
 22 this issue. (Resp. Lodg. No. 13 at 1). Therefore, the Court looks  
 23 through to the Superior Court's opinion. See Ylst, 501 U.S. at 801-  
 24 06. The Superior Court cites a California case for the proposition  
 25 that the California Supreme Court "has never required counsel to

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 27 <sup>6/</sup> The Superior Court did not explicitly make this finding. However, where a  
 28 state court does not explain its reasoning for its decision as to an element of  
 a multipart claim, a reviewing federal court must consider whether there was any  
 possible reasonable basis for the state court's decision. See Harrington, 131  
 S.Ct. at 784.

1 investigate all prospective witnesses." (Resp. Lodg. No. 11 at 4).  
 2 Respondent identifies no equivalent federal authority to support  
 3 that proposition.

4         The Superior Court determined that Petitioner had not shown  
 5 prejudice because he had failed to identify which witnesses Cohen  
 6 failed to call to testify and because he had not submitted declara-  
 7 tions establishing what their testimony would have been. (Resp.  
 8 Lodg. No. 11 at 4). However, Petitioner did identify his girlfriend,  
 9 Nancy Lattman, as an eyewitness to the incident and argued that  
 10 Cohen did not interview Lattman despite Petitioner's request that he  
 11 do so. (Resp. Lodg. No. 10 at 11).

12         Furthermore, when Petitioner appealed to the Court of Appeal,  
 13 he included a declaration from Lattman that established what her  
 14 testimony would have been. (Resp. Lodg. No. 12 at 12; Resp. Lodg.  
 15 No. 14 at Exh. D). Lattman declared that she was an eyewitness and  
 16 would have testified that Petitioner's vehicle was rammed by the  
 17 Brown SUV. (Resp. Lodg. No. 14 at Exh. D) Lattman was never  
 18 interviewed by Cohen nor did he ask her to testify.<sup>7/</sup> *Id.*

19         Lattman's declaration was first presented to the California  
 20 Court of Appeal in a Petition for Writ of Habeas Corpus. The opinion  
 21 of that court makes no mention of the declaration. Therefore, on  
 22 this issue, there is no reasoned opinion from any court and this  
 23 Court therefore conducts an independent review. See Delgado, 223  
 24 F.3d at 981-82.

25         Here, the question is whether Cohen was ineffective as  
 26 counsel when he failed to interview an eyewitness whose testimony  
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28 <sup>7/</sup> Mark Kirkness, the public defender initially assigned to Petitioner's case,  
 did interview Lattman prior to his withdrawal from the case. (Resp. Lodg. No. 14  
 at Exh. D).

1 would have supported a "ramming" defense and instead elected to  
 2 present an "inadvertent strike" defense. It is virtually certain  
 3 that, if Cohen had investigated both possible defenses, an election  
 4 to pursue one instead of the other would not constitute IAC. See  
 5 Strickland, 466 U.S. at 690-91 ("strategic choices made after  
 6 thorough investigation of law and facts relevant to plausible  
 7 options are virtually unchallengeable"). However, there is no  
 8 evidence that Cohen investigated the "ramming" defense at all.  
 9 Furthermore, it is possible that Cohen never even knew that a  
 10 "ramming" defense existed due to his alleged failure to meet or  
 11 discuss the case with Petitioner.<sup>8/</sup>

12 Under federal case law, a "defense attorney's failure to  
 13 consider alternative defenses constitutes deficient performance when  
 14 the attorney 'neither conduct[s] a reasonable investigation nor  
 15 ma[kes] a showing of strategic reasons for failing to do so.'" Rios  
 16 v. Rocha, 299 F.3d 796, 805-06 (9th Cir. 2002). As a result, it  
 17 appears that Cohen's performance fell below an objectively reason-  
 18 able standard. See Strickland, 466 U.S. at 691 ("counsel has a duty  
 19 to make reasonable investigations or to make a reasonable decision  
 20 that makes particular investigations unnecessary.") Cohen's failure  
 21 to consult Petitioner about possible defenses satisfies the first  
 22 prong of Strickland. See Florida v. Nixon, 543 U.S. 175, 187 (2004)  
 23 ("An attorney undoubtedly has a duty to consult with the client  
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25  
 26 <sup>8/</sup> Kirkness was aware of the "ramming" defense and interviewed Lattman.  
 27 However, Kirkness withdrew from the case when his office declared a conflict of  
 28 interest. Kirkness states that the results of his investigation were handed over  
 to the Alternate Public Defender ("APD"). Furthermore, he states that he is "sure  
 [the APD] gave them to attorney Cohen." (Resp. Lodg. No. 14 at Exh. E). However,  
 there is no evidence in the record that Cohen received these documents or reviewed  
 them.

1 regarding 'important decisions,' including questions of overarching  
 2 defense strategy.")

3 The second prong of Strickland requires that Petitioner show  
 4 resulting prejudice. Id. at 691-92. Specifically, Petitioner "must  
 5 show that there is a reasonable probability that, but for counsel's  
 6 unprofessional errors, the result of the proceeding would have been  
 7 different. A reasonable probability is a probability sufficient to  
 8 undermine confidence in the outcome." Id. at 694. In Johnson v.  
 9 Baldwin, the Ninth Circuit found prejudice when counsel failed to do  
 10 even 'minimal investigation' such as interviewing alibi witnesses or  
 11 investigate corroboration and the prosecution's case was so weak  
 12 that even minimal investigation could have led to a trial strategy  
 13 that would have prevented the jury from deciding to convict. Johnson  
 14 v. Baldwin, 114 F.3d 835, 840 (9th Cir. 1999).

15 Here, in contrast, the prosecution's case was strong. The  
 16 jury found that Petitioner had hit the Brown SUV intentionally in an  
 17 attempt to escape. Even if the "ramming" defense had been raised  
 18 instead of the "inadvertent strike" defense, the jury would still  
 19 have heard from the witnesses they ultimately found believable: the  
 20 three police officers whose testimony supported the prosecution's  
 21 theory of an intentional assault by Petitioner.

22 Petitioner suggests that his case parallels Larsen v. Adams,  
 23 718 F. Supp. 2d 1201 (C.D. Cal. 2010). In that case, trial counsel's  
 24 failure to interview a percipient witness was ineffective and  
 25 prejudicial because the interview would have revealed another  
 26 witness, James McNutt, whose testimony would have contradicted the  
 27 prosecution's theory of events. Larsen, 718 F. Supp. 2d at 1225.  
 28 However, in that case, the credibility of the witness was much

1 higher than here. There, McNutt was a retired police chief and  
 2 combat veteran who was then working as a correctional officer. Id.  
 3 at 1211. Here, there is nothing in the record suggesting that  
 4 Lattman had training or experience to more accurately observe  
 5 stressful situations. Furthermore, in Larsen, McNutt had only a  
 6 tenuous connection to the defendant.<sup>9/</sup> Here, in contrast, Lattman was  
 7 Petitioner's girlfriend. Accordingly, it is reasonable to assume  
 8 that a jury would find Lattman significantly less credible than the  
 9 jury in Larsen might have found McNutt.

10 Finally, even if Lattman had been called to testify, the jury  
 11 would still have heard propensity evidence about the two prior  
 12 incidents where Petitioner attempted to avoid arrest through high-  
 13 speed vehicular chases. See infra at 20-21.

14 Therefore, while there is a remote possibility that the  
 15 result of the proceeding would have differed, Petitioner has not  
 16 shown that it rose to a "reasonable probability" in light of the  
 17 totality of evidence presented at trial. See id. at 693-94. ("It is  
 18 not enough for the defendant to show that the errors had some  
 19 conceivable effect on the outcome of the proceeding.")<sup>10/</sup>

20 Cohen's failure to discuss the case with Petitioner resulted  
 21 in Cohen being unaware of the possibility of a "ramming" defense. As  
 22 a result, Cohen failed to investigate the viability of that defense.  
 23 These failures indicate that his performance as counsel fell below  
 24 an objective standard of reasonableness. However, it is not  
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26 <sup>9/</sup> Specifically, McNutt intended to meet Daniel Harrison, his stepson, to  
 27 celebrate a birthday. McNutt's wife testified that Harrison and the defendant  
 28 seemed to know each other but she did not think they were friends. Larsen, 718 F.  
 Supp. 2d at 1211-14.

<sup>10/</sup> However, "a defendant need not show that counsel's deficient conduct more  
 likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

1 reasonably probable that the outcome of the case would have been  
 2 different but for these failures.

3 Consequently, Cohen's failure to discuss the case with  
 4 Petitioner or failure to interview Lattman did not result in  
 5 prejudice sufficient to meet Strickland's prejudice test for IAC.

6 3. Cohen Failed to Conduct Any Reasonable Pretrial  
 7 Investigation

8 The California Court of Appeal and the Superior Court both  
 9 summarized this portion of Petitioner's IAC claim but did not  
 10 directly address it. (Resp. Lodg. Nos. 13 at 1, 11 at 3). Therefore,  
 11 this Court must consider whether the prior courts could have had any  
 12 reasonable basis for their decision. See Harrington, 131 S.Ct. at  
 13 784 (where a state court does not explain its reasoning for its  
 14 decision as to an element of a multipart claim, a reviewing federal  
 15 court must consider whether there was any possible reasonable basis  
 for the state court's decision).

16 Petitioner's argument in this regard is that Cohen failed to  
 17 conduct any independent investigation and relied entirely on police  
 18 reports, police statements, and police photographs. See Petition at  
 19 16. The U.S. Supreme Court has recognized that counsel has a duty to  
 20 make reasonable investigations or to make a reasonable decision that  
 21 further investigations are unnecessary. Wiggins v. Smith, 539 U.S.  
 22 510, 521 (2003). Furthermore, counsel's examination of the facts and  
 23 circumstances should be independent. Strickland, 466 U.S. at 680.  
 24 However, Petitioner does not identify any case suggesting that an  
 25 investigation must itself be independent to satisfy this require-  
 26 ment. In any event, counsel's decision not to investigate should be  
 27 considered with "a heavy measure of deference to counsel's judg-  
 28 ments." Id. at 691. The Supreme Court has recognized that "[t]here

1 comes a point where a defense attorney will reasonably decide that  
 2 another strategy is in order, thus making particular investigations  
 3 unnecessary" and that decision is due a heavy measure of deference.  
 4 Cullen v. Pinholster, 563 U.S. ----, 131 S.Ct. 1388, 1407-08 (2011).  
 5 It was reasonable for the Superior and appellate courts to determine  
 6 that Cohen's failure to independently investigate did not render him  
 7 ineffective.

8 Consequently, Petitioner has not shown that Cohen's alleged  
 9 reliance on documents produced by the police constituted IAC.

10           4. Cohen Improperly Allowed the Prosecution To Withhold  
 11           Exculpatory Evidence in the Form of A Video of the Incident  
 12           The Court of Appeal summarized and addressed this issue.

13           (Resp. Lodg. No. 13 at 1-2). Petitioner argued that Cohen was  
 14 ineffective because he did not obtain video evidence from the marked  
 15 police cars that were present during the events that led to  
 16 Petitioner's arrest. The Court of Appeal found that Petitioner  
 17 "concede[d] counsel made a discovery request and was told there were  
 18 no videotapes." (Resp. Lodg. No. 13 at 2). However, it appears that  
 19 the Court of Appeal misread the Petition. Petitioner stated that  
 20 "Cohen made an informal request for video [evidence] from the  
 21 prosecutor, who told him that no such video [evidence] exists  
 22 because unmarked [vehicular] units do not have video capability."  
 23 (Resp. Lodg. No. 12 at 17, emphasis added). The record presented to  
 24 the Court is unclear whether Cohen ever asked for video evidence  
 25 from the marked police cars that were present or whether Cohen ever  
 made a formal discovery request.

26           Nevertheless, there is no evidence in the record to support  
 27 Petitioner's conclusory claim that "it is common knowledge that all  
 28 black and white patrol units in La Mesa are equipped with video

1 devices." See Petition at 20. Even if such police cars are equipped  
 2 with video cameras, there is no evidence in the record that they  
 3 were active and recorded the events of the car chase and collision.  
 4 The Superior Court determined that "Petitioner's allegations [in  
 5 this regard] are conclusory and thus fail to state a *prima facie*  
 6 claim for relief." Given the lack of supporting evidence, this  
 7 determination was reasonable. On appeal, Petitioner did not provide  
 8 new supporting evidence for this claim.

9           Consequently, Petitioner has not shown that Cohen was  
 10 ineffective for failing to obtain videotapes of the events of this  
 11 case because there is no evidence that such videotapes existed.

12           5. Cohen Introduced Damaging Evidence

13           The California Court of Appeal did not summarize or address  
 14 this issue. (Resp. Lodg. No. 13 at 1). The Court therefore looks  
 15 through to the Superior Court's opinion. See Ylst, 501 U.S. at 801-  
 16 06. At trial, Cohen showed a computer simulation of the collision  
 17 produced by Ronald P. Carr, an expert accident reconstructionist  
 18 retained for this purpose. See Petition at 22-23; (Resp. Lodg. No.  
 19 14 at Exh. B). This simulation was largely based on documents  
 20 produced by the prosecution. See Petition at 22; (Resp. Lodg. No. 14  
 21 at Exh. B). The simulation relied upon the assumption that the Brown  
 22 SUV was stationary. (Resp. Lodg. No. 2 at 287). Carr did not visit  
 23 the scene, conduct interviews, or inspect the vehicles involved in  
 24 the collision. (Resp. Lodg. No. 14 at Exh. B).

25           Petitioner contends that the simulation supported the  
 26 prosecution's theory of the collision and that Carr's testimony was  
 27 "one hundred percent for the prosecution." Petition at 23. The  
 28 Superior Court found that the simulation was not contrary to the

1 defense raised at trial. This Court has previously determined that  
 2 Cohen's decision to present a defense based on the inadvertent  
 3 strike theory did not cause prejudice. Therefore, the Superior  
 4 Court's determination was reasonable because the simulation  
 5 supported a meritorious defense, albeit not the defense Petitioner  
 6 wished to present.

7 Furthermore, the fact that some of Carr's statements on the  
 8 witness stand supported the prosecution's case is not proof of IAC.  
 9 Witnesses are sworn to tell the whole truth, and nothing but the  
 10 truth. A witness is not sworn to selectively tell only those parts  
 11 of the truth that support the party calling him or her to the stand.  
 12 Therefore, counsel is not ineffective simply because some of the  
 13 testimony provided by a witness is damaging to counsel's client. If  
 14 it were otherwise, calling any defense witness to the stand could  
 15 result in a retrial due to prejudice.

16 Consequently, Petitioner has not shown that Cohen was  
 17 ineffective for placing Carr on the stand or for using Carr's  
 18 simulation in support of the inadvertent strike defense.

19 For the reasons set forth above, Petitioner has not shown  
 20 that Cohen's performance as counsel was both ineffective and caused  
 21 prejudice. Accordingly, the Court RECOMMENDS that Petitioner's first  
 22 ground for relief be DENIED.

23 B. GROUND TWO: BRADY VIOLATION

24 Petitioner contends that the prosecution committed a Brady  
 25 violation by suppressing evidence in the form of video footage from  
 26 the marked police cars present during the collision. See Brady v.  
 27 Maryland, 373 U.S. 83 (1962). The rule established by Brady is that  
 28 "suppression by the prosecution of evidence favorable to an accused

1 upon request violates due process where the evidence is material  
 2 either to guilt or to punishment" Id. at 87.

3         The Court notes that Petitioner's Brady claim is dependent  
 4 upon the failure of Petitioner's IAC claim. In that claim, Peti-  
 5 tioner argued that Cohen was ineffective for failing to request  
 6 video evidence via the discovery process. Conversely, Brady seems to  
 7 require a finding that counsel actually requested the evidence at  
 8 issue. Compare U.S. v. Agurs, 427 U.S. 97, 114 (1976) (no Brady  
 9 violation where evidence allegedly suppressed was not actually  
 10 requested and the evidence was not sufficiently exculpatory) with  
 11 Smith v. Cain, --- U.S. ----, 132 S.Ct. 627, 630 (2012) (failure to  
 12 voluntarily disclose evidence that would undermine sole prosecution  
 13 witness's credibility was a Brady violation.)

14         In any event, the materiality test set forth in Agurs is not  
 15 germane here because there is no indication that the evidence  
 16 Petitioner claims was withheld even existed. Petitioner's claim that  
 17 "it is common knowledge that all black and white patrol units in La  
 18 Mesa are equipped with video devices" lacks factual substantiation.  
 19 See Petition at 20. Furthermore, even assuming that the police cars  
 20 were equipped with video cameras, there is still no evidence in the  
 21 record that the cameras were turned on. Therefore, the Superior  
 22 Court's determination that "Petitioner's unsubstantiated claim that  
 23 such evidence exists is insufficient to support" the Petition was a  
 24 reasonable determination of the facts in light of the evidence and  
 25 was not an unreasonable application of Supreme Court precedent.  
 26 (Resp. Lodg. No. 11 at 5); see 28 U.S.C. § 2254(d).

27         Accordingly, the Court RECOMMENDS that Petitioner's second  
 28 ground for relief be DENIED.

1        C. GROUND THREE: EVIDENCE OF PRIOR BAD ACTS IMPROPERLY ADMITTED

2           Petitioner argues that evidence of two prior high-speed  
 3        vehicular police chases in which he had been involved were admitted  
 4        at trial in violation of his due process rights.<sup>11/</sup> The trial court,  
 5        relying on Cal. Evid. Code § 1101, ruled that the evidence could be  
 6        admitted because it tended to prove that the collision with the  
 7        Brown SUV was not a mistake, that Petitioner wanted to escape, and  
 8        that Petitioner had prior knowledge of how police officers conduct  
 9        a vehicular pursuit. On direct appeal, the California Court of  
 10      Appeal affirmed, finding that this evidence showed Petitioner  
 11      previously "[went] to great lengths to flee from the police rather  
 12      than be arrested" and that this "buttressed the prosecution's claim  
 13      that [Petitioner] intentionally chose to force his vehicle through  
 14      the gap [created] by hitting the [Brown] SUV." (Resp. Lodg. No. 7 at  
 15      14).

16           Respondent argues that Petitioner raises no federal question  
 17      in this regard. Respondent points to Alberni v. McDaniel, in which  
 18      the Ninth Circuit noted the absence of Supreme Court precedent on  
 19      the issue of propensity evidence. See Alberni v. McDaniel, 458 F.3d  
 20      860, 863-67 (9th Cir. 2006); Duvardo v. Giurbino, 410 Fed. Appx. 69,  
 21      70 (9th Cir. 2011); see also Estelle, 502 U.S. at fn.5 (the Supreme  
 22      Court "express[es] no opinion on whether a state law would violate  
 23      the Due Process Clause if it permitted the use of 'prior crimes'  
 24      evidence to show propensity to commit a charged crime.") Therefore,

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25  
 26        <sup>11/</sup> The first chase occurred in July 1987, when Petitioner was stopped by police  
 27        while he was driving a stolen Winnebago, accelerated away from the officer who  
 28        stopped him, and eventually resorted to flight on foot when the Winnebago came to  
           rest. The second chase occurred in April 2000, when police sought to arrest  
           Petitioner and he fled in a truck on city streets at speeds up to 70 miles per  
           hour. Again, Petitioner attempted to escape on foot when the truck became lodged  
           in an embankment.

1 the California courts could not have reached a decision contrary to  
 2 Supreme Court precedent because no precedent exists. See 28 U.S.C.  
 3 § 2254(d)(1). Neither could they have misapplied Supreme Court  
 4 precedent. Id. Finally, the Court of Appeal's determination of the  
 5 facts in this regard is not unreasonable given the evidence  
 6 presented. See 28 U.S.C. § 2254(d)(2). Consequently, AEDPA fore-  
 7 stalls granting a writ of habeas corpus.

8 Accordingly, the Court RECOMMENDS that Petitioner's third  
 9 ground for relief be DENIED.

10 D. GROUND FOUR: INSUFFICIENT EVIDENCE OF FELONY ASSAULT

11 Petitioner contends that there was insufficient evidence to  
 12 convict him of felony assault upon a police officer, and the  
 13 conviction was therefore a violation of his right to a fair trial  
 14 under the Fifth, Sixth, and Fourteenth Amendments. Specifically,  
 15 Petitioner raises two insufficiency of evidence claims: (1) the  
 16 evidence does not show that the collision was intentional and (2)  
 17 the evidence does not show that he knew, or should have known, that  
 18 the Brown SUV was occupied by police officers.

19 1. Collision Was Not Intentional

20 Petitioner argues that, under California case law, a driver  
 21 is guilty of felony assault if he uses the car as an instrument of  
 22 violence against another person but is not guilty of felony assault  
 23 when he merely drives recklessly and consequently causes a vehicle  
 24 collision. Petition at 42. Petitioner asserts that he recklessly,  
 25 but not intentionally, caused contact between his vehicle and the  
 26 Brown SUV. Id. at 43. Further, he argues that he veered away from  
 27 the occupied Brown SUV to minimize the impact damage (albeit to keep  
 28 his car moving towards his goal of escaping police). Id.

On direct appeal, the Court of Appeal noted that the requisite elements of assault under California law are that the defendant "intentionally perform an act with actual knowledge of the facts that would lead a reasonable person to realize that the act by its nature will probably and directly result in the application of physical force against another." (Resp. Lodg. No. 7 at 7 [citing People v. Williams, 26 Cal. 4th 779, 788, 790 (2001)]). Notably, "the defendant need not have an intent to injure..." Id. Here, the jury found that Petitioner's attempted escape fit within these elements. Furthermore, the Court of Appeal found that there "was sufficient evidentiary support for the jury to conclude that at the time [Petitioner] accelerated through the gap, he knew his path was blocked and that he would cause a collision." Id. at 8. This support came in the form of Runge's testimony that he had stopped moving the Brown SUV at the time of the collision. Id.

The Court of Appeal's determination of the facts was reasonable, in light of the evidence presented. See 28 U.S.C. § 2254(d)(2). Furthermore, the Court of Appeal's determination was neither contrary to, nor a misapplication of Supreme Court precedent. See 28 U.S.C. § 2254(d)(1); Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (determining whether sufficient evidence supports a conviction requires a review of the entire record in the light most favorable to the conviction to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.")

To the extent that Petitioner challenges the state court's interpretation and application of state law, federal courts have no authority to review those decisions. Estelle, 502 U.S. at 67-68 ("it

1 is not the province of a federal habeas court to reexamine  
 2 state-court determinations on state-law questions." )

3                   2. Evidence Does Not Prove Petitioner Knew or Should Have  
 4                   Known that the Brown SUV Was Occupied by Police Officers  
 5 Petitioner argues that he did not know that the Brown SUV was  
 6 occupied by police officers. The statute at issue, Cal. Pen. Code  
 7 245(c), requires proof that a defendant "knows or reasonably should  
 8 know that the victim is a peace officer." Petitioner asserts that,  
 9 although he may have been aware that the occupants of the Silver SUV  
 10 were police officers, there was no evidence suggesting that he knew  
 the occupants of the Brown SUV were also police officers.

11                  However, the Court of Appeal held that the jury determination  
 12 was reasonable. Specifically, the evidence at trial showed that  
 13 Petitioner was wanted for robbery in Washington State and encoun-  
 14 tered two SUVs when he tried to leave the residence. The Silver SUV  
 15 had flashing lights and a siren activated while the Brown SUV was  
 16 "positioned at an angle in the middle of the road to prevent  
 17 [Petitioner] from moving his car forward." Id. at 10. The Court of  
 18 Appeal found that it was reasonable for the jury, confronted with  
 19 this evidence, to infer that Petitioner knew or should have known  
 20 that the occupants of the Brown SUV were police officers. Id.

21                  The Court of Appeal's determination of the facts was  
 22 reasonable, in light of the record. See 28 U.S.C. § 2254(d)(2).  
 23 Furthermore, the Court of Appeal's determination was neither  
 24 contrary to, nor a misapplication of Supreme Court precedent. See 28  
 25 U.S.C. § 2254(d)(1); Jackson v. Virginia, 443 U.S. at 318-19

26                  AEDPA bars this Court from granting a writ of habeas corpus  
 27 in the absence of an unreasonable determination of the facts or a  
 28 state court decision that is contrary to, or a misapplication of,

1 Supreme Court precedent. See 28 U.S.C. § 2254(d). For the reasons  
2 set forth above, Petitioner's insufficiency of the evidence claims  
3 have not met this hurdle and thus no writ of habeas corpus may  
4 issue.

5 Accordingly, the Court RECOMMENDS that Petitioner's fourth  
6 ground for relief be DENIED.

7 Since the Court has recommended that all of the grounds for  
8 relief Petitioner has raised be denied, the Court further RECOMMENDS  
9 that the Petition be DENIED.

10 VI

11 RECOMMENDATION

12 After a review of the record in this matter, the undersigned  
13 Magistrate Judge RECOMMENDS that the Petition for Writ of Habeas  
14 Corpus be DENIED.

15 This Report and Recommendation of the undersigned Magistrate  
16 Judge is submitted to the United States District Judge assigned to  
17 this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

18 **IT IS ORDERED** that no later than April 23, 2012, any party to  
19 this action may file written objections with the Court and serve a  
20 copy on all parties. The document should be captioned "Objections to  
21 Report and Recommendation."

22 **IT IS FURTHER ORDERED** that any reply to the objections shall  
23 be filed with the court and served on all parties no later than  
24 May 7, 2012, the parties are advised that failure to file objections

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1 within the specified time may waive the right to raise those  
2 objections on appeal of the Court's order. Martinez v. Ylst, 951  
3 F.2d 1153 (9th Cir. 1991).

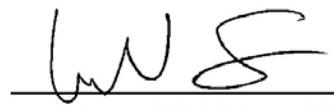
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6 DATED: April 2, 2012

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9 Hon. William V. Gallo  
10 U.S. Magistrate Judge

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